

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 4, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP1958-CR

Cir. Ct. No. 2011CF228

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TAVARES DEWAYNE WHITE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Tavares Dewayne White appeals from a judgment of conviction, entered on a jury verdict, for felony murder, with the underlying

crime of attempted armed robbery as a party to a crime, contrary to WIS. STAT. §§ 940.03, 943.32, 939.32, and 939.05 (2009-10).¹ White argues that he should receive a new trial because the trial court sustained the State's objection to a question concerning a detective's conversation with a witness and thereby prevented the defense from fully exploring an issue. We conclude that even if the trial court should have allowed further questioning on the issue, the error was harmless. Therefore, we affirm.

BACKGROUND

¶2 White was charged with felony murder in connection with the October 2010 shooting death of Matthew Thomas. The complaint alleged that White was one of four men who forced their way into a home and ordered the occupants, including Thomas and his brother Isaiah Thomas (hereafter, "Isaiah"), to lie on the ground. The assailants were armed with a handgun and a rifle. They asked for money, threatened the occupants, beat the brothers, and put property such as CDs, DVDs, and a game station onto a bed sheet. At some point, Thomas was shot. The complaint alleged that White was guilty of felony murder for causing the death of Thomas while committing the crime of armed robbery, as a party to a crime. At trial, the underlying crime was amended from armed robbery to attempted armed robbery at the State's request because there was no testimony that any of the items moved within the house were ultimately taken from the house after the shooting.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶3 The disputed issue at trial was whether White was one of the men who entered the house to rob its occupants. One of the State’s key witnesses was Isaiah, who viewed several lineups. On cross-examination, trial counsel asked Isaiah whether he had identified White during one of the lineups that took place in late December 2010. Isaiah said that he had identified White by his “[a]pppearance and voice.” Trial counsel then asked a series of questions concerning the basis for Isaiah’s belief that he had identified White during the lineup, including the question to which the State objected that forms the basis for White’s appeal:

[Trial Counsel]: How do you know you IDed him?

[Isaiah]: ‘Cause of the way—how he talked and his body weight.

....

[Trial Counsel]: Okay. Did anyone ever tell you that you made a positive ID?

[Isaiah]: Yes.

[Trial Counsel]: Who?

[Isaiah]: Detective Jack or something like that.

[Trial Counsel]: Jeremiah Jacks?

[Isaiah]: Yes.

[Trial Counsel]: Okay. And it’s your testimony that Jeremiah Jacks told you that you made a positive ID of appearance and a voice, correct?

[Isaiah]: Yes.

[Trial Counsel]: How exactly did he tell you this?

[Isaiah]: He—

[The State]: Object as to relevance of what a detective[] may have told him. He’s testified as to how he made the identification.

THE COURT: Sustained.

[Trial Counsel]: Where were you when you were told that you made a positive ID of Mr. White?

[Isaiah]: I was called. I was at home.

Following those questions, trial counsel moved on to other areas of questioning.

¶4 One area of additional questioning concerned the fact that when Isaiah filled out a paper form during the lineup, he circled “no” for all five persons in the lineup, indicating that he could not identify any of them. Isaiah explained at trial that after filling out the form, he spoke with the detectives and told them that White fit the description, but Isaiah was not “sure” that it was White. Isaiah testified that he was “sure now” that White was one of the men who entered the house.

¶5 Detective Paul Lough also testified about the lineup that included White. He said that after Isaiah viewed the lineup, Lough spoke with him about the fact that he circled “no” on the paper form, thereby indicating that Isaiah did not recognize anyone in the lineup. Lough said that Isaiah told him that White “had a very similar voice” as the man who spoke during the attempted robbery and also “had the same facial features,” complexion, and height. Lough said Isaiah told him that “the only thing that appeared to be different was ... that the subject appeared a little heavier” than the man Isaiah saw during the attempted robbery about three months earlier.

¶6 When Detective Jeremiah Jacks took the stand, both the State and trial counsel asked him about the phone call he made to Isaiah when the criminal complaint was filed. Jacks said that after charges were issued in the case, he called Isaiah to let him know that a complaint had been filed, consistent with Jacks’s practice of notifying family members so that they do not first learn through

the media that criminal charges have been filed. Jacks said that during that conversation, he did not talk with Isaiah about being a witness. Jacks also said that he never told Isaiah, either immediately after the lineup or on the phone, “that he had picked out the right person.”

¶7 In addition to presenting evidence that Isaiah recognized White as one of the four men who entered the house, the State introduced evidence that White’s fingerprint was found on a DVD case inside the house, which was consistent with Isaiah’s testimony that he saw White gathering up items including DVDs. The State also linked White to the crime by DNA and ballistics evidence. Specifically, when police responded to a call about a different home invasion that took place on December 17, 2010, they found a hat with a gun inside of it in a bush about two blocks away from the home.² DNA taken from the hat and the gun matched White, and the gun was identified by ballistics testing as the weapon that was used to kill Thomas.

¶8 The State also produced evidence that another man who was forced into the house and told to lie on the floor during the attempted armed robbery told the police that he recognized White’s voice in a subsequent lineup. A detective testified that the witness circled “yes” on the lineup form, indicating that he recognized White’s voice. However, at trial, the witness said he was “not sure” if he told the police that he recognized White’s voice during the lineup and added: “I don’t think I did.”

² White pled guilty to armed burglary with a dangerous weapon for that December 17, 2010 offense.

¶9 Finally, the State was permitted to introduce the testimony of a man named Cornelius Travis pursuant to WIS. STAT. § 904.04(2), as proof of White's motive, intent, and identity. Travis testified that he and White were involved in the December 17, 2010 armed burglary that led to the recovery of the hat and gun containing White's DNA. Travis said that several days before that burglary, he talked with White about Travis's need for money. Travis testified that White said he knew some drug dealers they could rob. Travis agreed to participate.

¶10 Travis said that he and two other men followed White into the home they planned to rob and then, at White's direction, Travis went upstairs to look for money. The occupants of the home were able to call the police and fight with the robbers. Ultimately, Travis and the two other men were arrested at or near the home, but White was not immediately apprehended. Travis said that during the crime, White was wearing a black "skull cap with a bib [sun visor] on it." He also testified that a photo of the hat recovered from the bush two blocks from the home was "similar to the hat that [White] was wearing."

¶11 In closing, trial counsel argued that the fingerprint on the DVD was insufficient to show that White participated in the crime. She also noted that White's DNA could have transferred from the hat to the gun and that Travis's DNA was also found on the hat. With respect to Isaiah's identification of White, trial counsel argued that Isaiah falsely believed that he had correctly identified White because Jacks told him on the telephone that he had picked the right person. Trial counsel also asserted that Isaiah lied about certain aspects of the crime and pointed out that Isaiah admitted that he lied when he initially told police that Thomas had been killed in a drive-by shooting.

¶12 The jury found White guilty of felony murder. He was sentenced to twenty years of initial confinement and five years of extended supervision, consecutive to any other sentence, including the sentence he received after he pled guilty to the December 2010 armed burglary. This appeal follows.

DISCUSSION

¶13 White presents a single issue on appeal: he contends that the trial court erred when it sustained the State’s objection when trial counsel asked Isaiah “[h]ow exactly” Jacks told Isaiah that he had positively identified White. White claims this denied trial counsel an opportunity to question Isaiah about the influence Jacks may have had on Isaiah’s identification of White.³ White argues that trial counsel “should have been allowed to inquire whether something Detective Jacks said made [Isaiah] Thomas more confident in his belief that Mr. White was the robber.” He explains:

If Detective Jacks made statements to Isaiah Thomas that assured him he had selected the correct person or even if Detective Jacks made innocent remarks and Isaiah Thomas mistakenly assured himself that police approved his choice, this evidence is relevant. The jury is entitled to determine whether the identification is free from taint or how much the exchange between Detective Jacks and Isaiah Thomas may have influenced an otherwise uncertain identification.

¶14 We observe that trial counsel was, in fact, able to elicit testimony from Isaiah that Jacks told him on the phone that he had picked the right person. But even if we assume that the trial court should not have sustained the State’s objection to trial counsel’s follow-up question and instead should have allowed

³ White does not identify specifically what additional testimony he would have elicited if the State’s objection to trial counsel’s question had not been sustained.

trial counsel to continue questioning Isaiah about what Jacks allegedly told him, we conclude that the error was harmless.

¶15 Our supreme court recently reiterated the applicable legal standards for harmless error in *State v. Travis*, 2013 WI 38, __ Wis. 2d __, __ N.W.2d __. The court stated:

To assess whether an error is harmless, we focus on the effect of the error on the jury’s verdict. This test is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We have held that in order to conclude that an error did not contribute to the verdict ... a court must be able to conclude beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. In other words, if it is clear beyond a reasonable doubt that a rational jury would have convicted absent the error, then the error did not contribute to the verdict.

Id., ¶67 n.54 (citations and internal quotation marks omitted). Application of the harmless error test presents a question of law we review *de novo*. *State v. Ziebart*, 2003 WI App 258, ¶26, 268 Wis. 2d 468, 673 N.W.2d 369.

¶16 Applying those legal standards here, we conclude that the trial court’s alleged error was harmless. To begin, we observe that one component of the defense strategy was to assert that Jacks told Isaiah he had correctly identified White in the lineup and that this led Isaiah, in the words of trial counsel, to “make[] up testimony that he’s positive it was Mr. White who came in [to the house] alone and started making commands and was there to rob the place.”⁴ To support this theory, trial counsel pointed to Isaiah’s testimony that Jacks told him

⁴ Isaiah testified that White was the first man to enter the house and that the other men followed.

that he had “picked the right person.” Thus, trial counsel was able to use Isaiah’s testimony to advance the defense’s theory.

¶17 Even if additional testimony about the call Jacks placed to Isaiah would have led the jury to question the strength of Isaiah’s identification of White, the jury still had before it fingerprint evidence linking White to the crime scene. White suggests on appeal that the fingerprint “may merely show he had contact with the property at some earlier time.” He explains: “[The State] conceded the residence might be a drug house, so fingerprints on an item may be as common as any innocently placed fingerprints in any legitimate commercial business.” White elected not to testify, so he did not offer any testimony suggesting that he ever frequented what he now claims was a drug house and touched a DVD case in the house. The jury was free to reject unsupported theories and conclude that White left the fingerprint while he was gathering property during the robbery, which was consistent with Isaiah’s testimony.

¶18 The State also produced evidence that the gun that was used to shoot Thomas was later found in a hat. White does not dispute that his DNA was on both the hat and the gun. On appeal, White argues that it is “possible that the killers got rid of the gun and it wound up with Mr. White.” While that may be possible, there was no evidence presented at trial to support that theory.

¶19 In summary, the jury had before it testimony and numerous pieces of evidence—both direct and circumstantial—that tied White to the crime scene and to the gun used to kill Thomas. The jury also heard evidence of White’s involvement in another crime that was offered as evidence of White’s motive, identity, and intent. It was the jury’s role to decide issues of credibility, weigh the evidence, and resolve conflicts in the testimony. *See State v. Poellinger*, 153

Wis. 2d 493, 506, 451 N.W.2d 752 (1990). We are convinced, beyond a reasonable doubt, that the jury would have found White guilty even if the defense had been permitted to elicit additional details about Jacks's conversation with Isaiah. See *Travis*, 2013 WI 38, ¶67 n.54. Therefore, the trial court's alleged error was harmless and White is not entitled to relief. We affirm the judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

